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Editor: Bernard Schwartz

Professor of Law, New York University School of Law

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INHERENT EXECUTIVE POWER

In 1950, a study of French administrative law was published in England entitled *Government by Decree.* This title was intended to emphasize the fact that, in a continental country like France, government is carried on as much by exercises of inherent Executive authority as it is by administrative exercises of authority delegated by the legislature. This is particularly apparent insofar as the administrative rule-making power is concerned. The common lawyer who examines the rule-making power in France is immediately struck by the fact that, in the French system, the administration is vested with the inherent authority to promulgate rules which have the force of law. This is something which is foreign to Anglo-American conceptions of Executive power, for, in our theory, the administration possesses only the rule-making authority which has been delegated to it by the legislature.

The French Constitution, like the American one, contains a general direction to the head of the Executive branch to ensure the execution of the laws. Under the Constitution of 1946, it is the French Prime Minister who is vested with this constitutional charge. As far as his rule-making authority is concerned, he has no need of an express legislative delegation. A general rule-making authority is to be found in his "inherent powers." This is the term used in a famous French case, where the Executive power was expressly stated to be based upon the constitutional charge to ensure the execution of the laws. Under the French theory, the inherent rule-making authority of the Executive is a very broad one. It includes the power to promulgate any rule which is considered necessary to promote public order, safety, health, and tranquility —which, in effect, means any rule which the Executive deems to be in the public interest.

American constitutional theorists have not been slow to claim for the Executive in this country an inherent power similar to that which has existed in the Executive in continental countries, like France. Such theories which involve, in effect, a readaptation of the English notion of prerogative to contemporary American conditions, appear inconsistent with our basic theory of administrative authority as delegated,

rather than inherent. It has, however, been difficult to assert categorically that they are wholly incorrect, because of the lack of clarity in the constitutional provisions relating to Executive power.

The domain of the executive power, as one student has expressed it, constitutes a sort of "dark continent" in our jurisprudence, the boundaries of which are still undetermined. The constitutional provisions are among the most unclear in that instrument. The language of Article II is vague and indefinite by comparison with the Articles defining the powers of the other branches of the Government. "The executive power shall be vested in a President of the United States of America . . . The President shall be Commander in Chief of the Army and Navy . . . he shall take care that the Laws be faithfully executed."

One school of constitutional construction —adherents of the so-called James Wilson —Theodore Roosevelt doctrine—derives a theory of inherent Executive power from the differences in the language used in Article II from that employed in Article I. The latter reads: "All legislative powers herein granted shall be vested in a Congress." The absence of such express limitations in the general grant of *"the* executive power" to the President has led to the assertion that the authority vested in the President includes all powers executive in nature, though not specifically enumerated in Article II; that "the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers," and denying "that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization for it." *(T. Roosevelt, Autobiography, 57).*

If the decision of the Supreme Court in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 72 Sup. Ct. 863, the steel seizure case, decided June 2, 1952, means anything, it means that that tribunal has repudiated this theory of unlimited inherent power in the Executive. "It is clear," stated Justice Black in delivering the Court's opinion, "that if the President had authority to issue the order he did [i.e., that seizing the steel industry], it must be found in some provisions of the Constitution. And it is not claimed that express Constitutional language grants this power to the President." It was, however, contended that Presidential power should be implied from the aggregate of his powers under Article II. This contention was unequivocally rejected by the majority of the Court.

Advocates of the doctrine of inherent Executive power usually rely primarily upon two specific provisions of Article II, that stating that the President is the Commander in Chief and that charging him with the faithful execution of the laws. The Court in the *Youngstown* case has held that these are not sufficiently substantial supports for so significant a power in the Executive. "The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the armed forces," asserted Justice Black. "Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our Constitutional system hold that the Commander in Chief of the armed forces has the ultimate power as such to

take possession of private property in order to keep labor disputes from stopping production."

The Court's answer to the contention based upon the "faithful execution" clause of Article II was similar. Advocates of inherent Executive power have urged that this clause implies a vast residue of authority in the Executive—fully as sweeping as that inferred from the "necessary and proper" clause of Article I. It should be noted that, as shown above, this is precisely the view which has prevailed in continental countries, like France, with regard to the question of inherent Executive power.

This argument based upon the "faithful execution" clause has particular force in its application to Executive action taken in connection with the prosecution of a formally declared war. A declaration of war is as much a part of the statute-book as those other laws whose faithful execution the President is exhorted to attend to. As Justice Story pointed out almost a century and a half ago, the power to see that this law is faithfully executed carries with it the authority to take all steps necessary for such execution. *Brown* v. *United States*, 8 Cranch 110, 145, 149 (U.S. 1814).

The exercise of inherent Executive power in execution of a declaration of war does not, however, present the case of the greatest difficulty. That case occurs when the Executive relies upon inherent power to deal with an emergency when the nation is not formally at war. If assertions of unrestricted Executive power are valid in such cases, then our constitutional system is not as different from continental systems, like the French, as one would have hoped. Exercises of inherent power, which are not in execution of a declaration of war, run counter to the basic principle that Executive power is, with us, delegated, rather than autonomous. It is in such cases that the constitutional shoe really "pinches."

As it was expressed by Justice Jackson, concurring in an important case, "No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult . . . Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed." *Woods* v. *Cloyd W. Miller Co.*, 333 U. S. 138, 146 (1948).

One nurtured upon common-law constitutional traditions must reject the view that the American Executive possesses authority as vast as that of its counterpart in a continental country, like France. Reliance upon the constitutional grant of the power to take care that the laws be faithfully executed can be of little avail if, in the particular case, the Executive action which is at issue does not find its source in a law, which the action concerned is seeking to execute. In war-time, as has been pointed out, Executive acts related to the war effort are taken in execution of the declaration of war enacted by the legislature. But, absent such a formal declaration, the Executive action must find its source in some other law

passed by the Congress. For, if it is not taken in execution of a law, it cannot be justified by reliance upon the "faithful execution clause."

This was clearly the view of the majority of the Court in the steel seizure case. "In the framework of our Constitution," reads the Court's opinion, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute . . . This is a job for the nation's lawmakers, not for its military authorities."

To constitutional and administrative lawyers, the *Youngstown* case will remain of primary importance as an illustration of the basic principle that, in our system, assertions of Executive power are subject to judicial control. Though our courts may accept the existence of some inherent authority in the Executive to deal with emergencies, that does not eliminate the need for judicial control. When Executive action "directs interferences with liberty or property—measures normally beyond the scope of governmental power, which are lawful if at all only because an abnormal situation has made them necessary and appropriate—it is of the very essence of the rule of law that the executive's *ipse dixit* is not of itself conclusive of the necessity." *(55 Harv. L. Rev. at 1272).*

To assert that Executive emergency power should not be subject to judicial control is, in Justice Murphy's words, to advance an argument as untenable today as when it was cast in the language of the Plantagenets, the Tudors and the Stuarts. *Duncan* v. *Kahanamoku,* 327 U. S. 304, 329 (1946). "If this position could be deemed well taken, it is manifest that the fiat of [the Executive], and not the Constitution of the United States, would be the supreme law of the land . . . There is no such avenue of escape from the paramount authority of the Federal Constitution." *Sterling* v. *Constantin,* 287 U. S. 378, 397 (1932).

It thus seems clear that, even if we were to accept the assertions of those who assert authority in the Executive to cope with emergencies, we would, at the same time, constantly have to reiterate the need for judicial control. Executive action must not be proof of its own necessity, nor must Executive judgment be conclusive that its action was justified by exigency. In our system, as Chief Justice Hughes stated in a landmark case, "What are the allowable limits of [Executive] discretion, and whether or not they have been over stepped in a particular case, are judicial questions." *Sterling* v. *Constantin,* 287 U. S. at 400.

It is the existence of judicial control over exercises of Executive authority that minimizes the danger of "government by decree" in this country, such as that which has occurred so often in countries where the judicial safeguard has been absent. It should not be forgotten that it was the recognition in the Weimar Constitution of unrestrained power in the Executive to deal with emergencies that helped pave the way for the downfall of the German Republic. And, it was the existence of similar authority in the French Executive that eased the

transition to the regime of Vichy in 1940. It is not enough to say that Executive freedom of action is essential to deal with exigencies, as the Executive is the only branch of government that can act efficaciously to protect the public in emergency. "From time immemorial," as Justice Murphy has eloquently pointed out, "despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised." *Duncan* v. *Kahanamoku*, 327 U. S. at 330.

FORMS OF ACTION IN ADMINISTRATIVE LAW

Review of administrative action in the Anglo-American world has been greatly influenced by the common lawyer's concern with the procedural aspects of justice. The result has been an undue emphasis upon technicalities of pleading and forms of action in a field where there is little place for the over-technical procedural niceties that have generally prevailed in our law.

In an ordinary case between two private citizens, it may be difficult for the seeker after justice to comprehend why he has not prevailed in his righteous cause merely because his counsel has failed to frame his complaint within the proper form of action. But it is, after all, only he who is aggrieved if he has not observed the technical rules of the legal game. In a case where the administration is a party, however, much more is at stake. Society as a whole has a very direct interest in ensuring administrative conformity to the principle of legality. If an individual who is adversely affected by illegal administrative action does not succeed in his suit to have such action annulled because of his inability to avoid the perilous pitfalls of legal procedure, it is not he alone who is aggrieved. An illegal act of the administration has been permitted to go untouched, and the interest which a democratic society has in the vigorous enforcement of the principle of legality has thereby been left unvindicated.

Anglo-American courts have tended to lose sight of the need for simplicity of procedure in administrative-law cases. The forms of action available to one adversely affected by administrative action have developed from those available at common law in the Court of King's Bench for controlling the action of inferior courts. These have been the writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus—the so-called "extraordinary" or "prerogative" writs. As explained by Lord Justice Atkin in a leading case, with regard to certiorari and prohibition, "both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling

jurisdiction of the King's Bench Division exercised in these writs." *Rex* v. *Electricity Commissioners,* [1924] 1 K.B. 171, 205.

The extraordinary writs, or remedies, as they have more recently been termed, which have thus become the normal means by which review of administrative action has been obtained, in the absence of statutory provisions for review, in the Anglo-American world, have not been immune from the archaic and cumbrous technicalities which have characterized all of the forms of action at common law. "The extraordinary legal remedies . . . have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural bog which bars him from his goal." *Borchard, Declaratory Judgments XV.*

That the extraordinary remedies are wholly incongruous in the field of administrative law seems almost self-evident to one who examines their workings closely. "An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies," asserts a recent treatise on American administrative law. "For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system." *Davis on Administrative Law* 718

If a legal rule, institution, or method of procedure is not working satisfactorily, there are several courses for would-be reformers to advocate. The simplest is to abolish it and substitute something better. This is clearly what should be done with the extraordinary remedies in the field of administrative law. "The cure is easy. Establish a single, simple form of proceeding for all review of administrative action. . . . Get rid of extraordinary remedies as means of review." *Id. at 719.*

It is, however, not often that the simple remedy of abolition is adopted with regard to an unsatisfactory legal rule or institution. It is natural that so straight forward a remedy should only be employed when there are men with vigor and courage to carry it out. It is apt to be characteristic of the great moments of the common law, therefore, rather than of those less heroic times when the system is in repose.

The present may not be one of the heroic moments of the common law. But it is certainly not an era when our legal system is in repose. Surely this is a time, then, when the abolition of the extraordinary remedies from the field of administrative law can be urged as a practical matter, with the hope that advocacy here will be given more effect than the usual panaceas proposed by the academic theorist.

Thus far, it must be admitted, not too much has been done on this score in the

common-law world. The Committee on Ministers' Powers, which was appointed by the Lord Chancellor to investigate administrative law in Britain did conclude that "procedure by way of *certiorari, prohibition,* and *mandamus* is archaic and in some ways cumbrous and inelastic, and we would suggest the expediency of introducing a simpler, cheaper and more expeditious procedure." *Report, 62.* But the Committee did not go so far as to repudiate completely the extraordinary remedies, and the Administration of Justice Acts, 1933 and 1938, which sought to give effect to its suggestion, provided only that simple orders of mandamus, prohibition, and certiorari be substituted for what were formerly known as the prerogative writs. This did mean a simplification in procedure for those seeking review of administrative action. It did not, however, in any way alter the legal effects of what had previously been the extraordinary remedies nor eliminate the problem of forms of action from the field of administrative law.

Though the Acts of 1933 and 1938 did not thus deal squarely with the problem, it has been dealt with by the British Parliament in statutory provisions dealing with review of certain administrative agencies. The Housing Act of 1930, for example, provides that the legality of slum clearance and compulsory purchase orders made under it may be challenged by a simple application to quash in the High Court. And it is provided that such application is the only method by which judicial review may be obtained, for the use of certiorari, prohibition, or any other legal proceedings whatsoever is expressly precluded.

The Housing Act procedure does effectively substitute a simple petition for review for the extraordinary remedies. But it does so only in the cases covered by it. Though there is a tendency in Britain to reenact the Housing Act type of statutory review in subsequent laws conferring authority upon the administration, it is still too early to say that such statutory review provisions have completely taken over the field. In the absence of express provision in statutes for the Housing Act type of review—and there are still many such cases—judicial review of administrative action in Britain is still obtained essentially through the extraordinary remedies.

Nor should it be assumed that the situation in the United States is any better. Except for Illinois and New Hampshire, which have expressly abolished the extraordinary remedies as a means of reviewing administrative action and have substituted for them a simple, uniform action for review, the extraordinary remedies continue to dominate the procedural aspect of judicial review in the American States. And this is true even in cases where the use of the extraordinary remedies has seemingly been repudiated by the legislature. Thus, Section 1283 of the Civil Practice Act of New York provides: "The classifications, and writs and orders of certiorari to review, mandamus and prohibition are abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article." Yet, as stated by the highest court of New York, this provision leaves untouched the technical distinctions involved in the extraordinary remedies. "The nature of the alleged

grievance determines, none the less, the form of the hearing before the court to which the aggrieved party is entitled, the questions to be determined at such hearing, and the relief which the court has the power to grant." *Newbrand* v. *Yonkers*, 285 N. Y. 164, 174 (1941).

In the federal field, the extraordinary remedies have not played as large a role. This is in great part due to *Degge* v. *Hitchcock*, 229 U. S. 162 (1913), which held that certiorari, which is the most commonly used of the extraordinary remedies in the administrative-law field, could not be used to obtain review of an administrative order. In its place, the federal courts have relied mostly upon the injunction. But injunction is an equitable remedy, and there has been insistence upon satisfaction of the requirements of equity jurisdiction in particular cases. The federal courts have thus avoided the technicalities connected with certiorari, only to find their review power encumbered with those involved in injunctions. And, indeed, it should not be assumed that the elimination of certiorari has meant the disappearance of the extraordinary remedies in the federal field. The complexities of mandamus, habeas corpus, and prohibition still put in their appearance in particular cases to plague those seeking review by the federal courts.

This multiplicity of forms of action appears hardly to be affected by the Federal Administrative Procedure Act. It provides that the form of proceeding to review administrative action shall be, in the absence or inadequacy of statutory provisions for review, "any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction or habeas corpus)"—which, according to the Senate Committee on the Judiciary, "is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review." *APA, Legislative History*, 212.

The above situation has been substantially changed for the better in the case of many federal agencies, for the review of whose proceedings a simplified procedure has been provided by statute. The model here has been the Federal Trade Commission Act of 1914 which states that a person against whom the Commission has issued a cease and desist order may obtain review of such order by filing a petition for review in the appropriate federal court of appeals. This simple procedure for review by petition has been copied in a large number of later statutes. It is very similar to the review procedure provided for under the British Housing Act of 1930, and it is to be hoped that it, too, will tend to take over the field. Until it does so, however, review in the federal courts will continue largely to be dominated by the common-law forms of action.

SUPREME COURT

Administrative Power.—The extent to which the crime-making power is delegated to the administration under modern statutes is illustrated by *Boyce Motor Lines* v. *United States*, 72 Sup. Ct. 329 (1952). It involved a prosecution for the violation of an ICC regulation, which provided that the drivers

of motor vehicles transporting explosive or inflammable materials shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving in congested areas. The enabling statute directs that whoever knowingly violates such regulations shall be subject to fine or imprisonment or both. The Court held the regulation valid, as against the contention that it did not set forth an ascertainable standard of guilt. In his opinion, Justice Clarke treated the regulation as though it was a criminal statute, for the purpose of determining whether the standard in it was sufficiently definite.

Justice Clarke's approach follows logically from the familiar principle that a regulation, which is *intra vires* the enabling legislation, has the force and effect of a statute. One wonders, however, whether that principle should be applied with full logical rigor to a case of this type. As Justice Jackson expressed it, in dissenting, where the federal crime-making power is delegated to an administrative body such as the ICC, a court is justified in requiring considerable precision in its exercise. To say that the regulation would not have been too vague if enacted by the legislature does not necessarily mean that it is definite enough, when it is promulgated by an administrative agency. There are checks which prevail upon the elected representatives of the people which are clearly not present in the case of officials of the administration. One can consequently urge the need for a requirement of defined standards in exercises of powers of delegated legislation, just as there is a requirement of such standards in the case of statutes delegating legislative power to the administration.

APA: Applicability.—In *Harisiades* v. *Shaughnessy*, 72 Sup. Ct. 512 (1952), the APA was held to be inapplicable to deportation proceedings instituted before the effective date of the Act. The claim of the alien that, the APA aside, he was denied procedural due process because the same individual acted both as presiding officer and examining officer at the hearing was likewise held to be without substance where he had not objected before the agency.

Deportation cases.—*Harisiades* v. *Shaughnessy*, 72 Sup. Ct. 512 (1952), and *Carlson* v. *Landon*, 72 Sup. Ct. 525 (1952), deal with important aspects of the deportation power under the Alien Registration Act of 1940 and Internal Security Act of 1950. In view of the broad language in the opinions, especially in the *Harisiades* case, emphasis must be placed upon what the Court did *not* decide in the two cases. In *Harisiades*, the Court held that the legislative provision for the deportation of an alien, who had at any time been a member of the Communist Party, did not contravene any provision of the Constitution. In so doing, the Court implied that the question of who should be deported was solely a legislative question which the judiciary could not review. The right to terminate hospitality to aliens, as Justice Frankfurter, concurring, expressed it, and the grounds on which such termination should be based, are matters solely for the responsibility of the Congress and wholly outside the power of the Court to control. It should, however, be emphasized that the extreme of judicial abnegation exemplified by this case extends only

to the legislative prescription of the classes of deportable aliens. Courts still have the function of enforcing the requirements imposed by Congress upon officials in administering immigration laws, as well as the procedural requirements imposed by the demands of due process. The *Harisiades* case does not, therefore, restrict the role of the federal courts in their review of deportation proceedings. They must still look to see whether a fair hearing was accorded and whether the deportation order has a substantial evidentiary basis.

Carlson v. *Landon* involved review of the action of the Attorney General in denying bail to aliens taken into custody, pending determination as to their deportability as members of the Communist Party under the Internal Security Act. The Court held that the legislative grant to the Attorney General of the discretion to deny bail did not amount to an unconstitutional delegation of legislative power, even though there were no standards to guide him in determining when to admit to bail and when to detain. Congress need not make specific standards, said Justice Reed, in striking one more judicial nail into the coffin of what many still believe to be a fundamental requirement of democratic government, that of defined standards in statutes delegating legislative power. Nor, said the Court, was the discretion of the Attorney General abused here in his denial of bail to members of the Communist Party.

Stress should be placed upon the fact that the holding of the Court was not that the Attorney General's discretion is not subject to any judicial review. The opinion, indeed, states expressly that the administrative discretion can be overturned on a showing of clear abuse. One may disagree, as did four of the Justices, with the Court's application of this principle in the instant case. Especially persuasive is Justice Frankfurter's dissent, which asserts the need for individualized consideration of risk in particular cases, for the administrative discretion to be exercised properly.

Primary Jurisdiction.—International Longshoremen's Union v. *Juneau Sp. Corp.*, 72 Sup. Ct. 235 (1952), involved an action by an employer against a union for damages caused by a jurisdictional strike, of the type prohibited by section 303 (a) (4) of the Labor Management Relations Act. Defendants contended that such action in a federal court could be brought only after a determination by the NLRB that the acts complained of were unfair labor practices. The Court held, however, that the action in the district court could be maintained independently of any administrative determination, in view of the express provision in the Act for suit by anyone injured by any violation of the statutory prohibition against jurisdictional strikes. Both section 8(b) (4) (D) and section 303 (a) (4) of the Act condemn substantially the same conduct. But the first gives rise to an administrative finding, while the second leads to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies, says Justice Douglas, is strong confirmation of the conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of section 303 (a) (4) which makes its remedy dependent on any admin-

istrative determination that an unfair labor practice has been committed.

The Court's decision may, at first glance, appear inconsistent with the doctrine of primary jurisdiction as it is applied in the federal courts. If the questions involved in a case fall within the competence of an administrative agency, the Court has constantly insisted upon the fact that the agency has exclusive jurisdiction. The courts cannot take cognizance of the matter until the agency has itself determined those questions. Nor, under the federal rule, does it make any difference that the remedy of damages which is sought in the court is one which it is beyond the power of the agency to accord. See *Interstate Nat. Gas Co.* v. *Southern California Gas Co.*, 102 F. Supp. 685 (S.D. Cal. 1952), discussed *infra* p. 73. What makes the result different in the instant case appears to be the fact that the enabling Act expressly provides for an independent judicial remedy. The doctrine of primary jurisdiction is thus seen to give way in the face of an expression of legislative intent that it is not to apply. (*Quaere:* Is there sufficient expression of such legislative intent here? The Labor Act makes provision for an independent judicial remedy, but does it do so in any more explicit terms than the statute involved in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the case which laid down the primary jurisdiction principle?)

A more usual primary jurisdiction case is *Far East Conference* v. *United States,* 72 Sup. Ct. 492 (1952). It involved an action brought by the United States under the Sherman Anti-Trust Act to enjoin a dual-rate system enforced in concert by steamship carriers engaged in foreign trade. In such a case, Justice Frankfurter asserted, a district court cannot pass on the merits of the complaint before the Federal Maritime Board has passed upon the question. In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Nor does the fact that this action is brought by the Government, rather than by a private citizen, make any difference here. The same considerations of administrative expertise apply, whoever initiates the action.

Standing.—Doremus v. *Board of Education,* 72 Sup. Ct. 394 (1952) re-affirms the Court's consistent jurisprudence with regard to the standing of a taxpayer to bring a review action. Ever since *Massachusetts* v. *Mellon,* 262 U.S. 447 (1922), the federal courts have held that one alleging only his interest as a taxpayer has no standing to sue. The interest of a taxpayer, reads the opinion in the instant case, in the moneys of the federal government are too indeterminate, remote, uncertain and indirect to furnish a basis for an appeal to the powers of the Court over their manner of expenditure.

Availability of review: APA.—That the review provisions of the APA do not change the rule requiring suits to review action of commission-type agencies to be brought

against their members individually, in the absence of statutory authorization to sue the agency as an entity, is the Court's holding in *Blackmar* v. *Guerre,* 72 Sup. Ct. 410 (1952). The case involved an action against the Regional Manager of the Veterans' Administration and the Civil Service Commission for a judgment setting aside plaintiff's discharge from his position in the Veterans' Administration. The Court held that, since the Civil Service Commission is not a corporate entity which Congress has authorized to be sued, a suit involving the action of the Commission generally must be brought against the individual Commissioners rather than against the Commission as an entity. Plaintiff had contended that his review action was authorized by the APA. Justice Minton stated, however, that there is no specific authorization in the Act for suit against the Commission as an entity. Still less is the APA to be deemed an implied waiver of all governmental immunity to suit. Even if the Commission's action is reviewable under section 10 of the APA, it is reviewable only in a court of "competent jurisdiction." And, here, the courts of the District of Columbia are the only courts of competent jurisdiction to reach the members of the Civil Service Commission.

Ultra vires.—In the leading case of *Stark* v. *Wickard,* 321 U.S. 288 (1944), it was held that an order of the Secretary of Agriculture fixing minimum prices for milk, which provided for deductions from the price fixed for payments to be made to co-operatives, could be challenged in court by milk producers, as against the contention that they had no standing to bring a review action. In *Brannan* v. *Stark,* 72 Sup. Ct. 433 (1952), the Court has now dealt with the merits of the producers' review action. In an opinion by Justice Clarke, the Court held that the provisions of the Secretary's order for deductions for payment to co-operative associations were *ultra vires* the enabling legislation. These provisions were inconsistent with the statutory requirement that uniform prices be paid for all classes of milk, for, in effect, because of them, co-operatives received a higher price than proprietary producers. There was a strong dissent by Justice Black, who asserted that the decision was inconsistent with basic administrative law principles, which require courts to accept administrative interpretations of broad statutory terms even though it is not the one the court would have reached, if the question had arisen in the first instance before it. It is difficult, however, to determine from the skeleton-like nature of much of Justice Clarke's opinion whether the dissent is correct in assuming that the case marks a rejection by the Court of the doctrine of *Gray* v. *Powell,* 314 U.S. 402 (1941).

PROCEDURE ACT CASES

Applicability.—A decision in the District of Columbia deals with the applicability of section 5 of the APA to Post Office Department proceedings involving the sending of obscene matter through the mails. After a hearing, the Postmaster General had found that motion picture films which appellant distributed through the mails were obscene and had stopped delivery of mail addressed

to him. Though the Government recognized that, under *Cates* v. *Haderlein,* 342 U.S. 804 (1951), the APA does apply to certain Post Office hearings, it contended that obscenity cases are within the APA's exception of "proceedings in which decisions rest solely on inspections, tests, or elections." The court felt, however, that they are not within the exception. The Act exempts from its procedural requirements, because they "rest solely on inspection", only decisions that turn either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts, as to which administrative hearings have long been thought unnecessary. The administrative decision here was not based "solely on inspection", although it is now contended that it might have been. A hearing was held, for it was required by due process. It follows that section 5 of the APA applies to the hearing. *Door* v. *Donaldson,* 2 Pike & Fischer Ad.L. 2d 15 (App. D.C. 1952).

The applicability of the procedural provisions of the APA to a deportation proceeding instituted before the effective date of that Act was considered in *United States ex rel. Didente v. Ault,* 101 F. Supp. 496 (N.D. Ohio 1951). The court held that the APA, by its express terms, did not apply to a proceeding in which the warrant was issued and served and a hearing had in 1944, even though a subsequent hearing was held in 1949. This is true even though the Immigration and Naturalization Service had adopted regulations in 1950 complying with the requirements of the APA. For, on September 27, 1950, Congress enacted as a rider to the general appropriation act an express exemption of deportation proceedings from the APA. By virtue of this, the APA is not applicable to them, and the departmental regulations referred to are now without meaning and effect. Nor could it be claimed that the agency procedure here was violative of due process. Congress has taken the action suggested by the Supreme Court in *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1950), and exempted the Immigration and Naturalization Service from the operation of the APA. It would be an impertinence, says the court, to suppose that this suggestion of the Supreme Court was made without regard to the effect of such Congressional action upon the constitutional requirements of due process.

Rule-making.—In *Gibson Wine Co. v. Snyder,* 194 F. 2d 329 (App. D.C. 1952), plaintiff sought an injunction restraining defendants from prohibiting plaintiff from labelling its wine, which was produced from boysenberries, as "blackberry wine." The relevant agency, the Alcohol Tax Unit of the Bureau of Internal Revenue, had issued a ruling to the Wine Institute that, under the statute and regulations concerned, it was of the opinion that wine derived wholly from boysenberries should be labeled "boysenberry wine." Plaintiff contended that this ruling was invalid because no hearing was had prior to its promulgation as required by the enabling Act and section 4 of the APA. The court held, however, that this was not a regulation but only an interpretative ruling. As such, it was not subject to the requirements of a hearing prior to promulgation or of the rule-making procedure of the APA. There was a strong dissent by Judge Miller. In his view, the agency ruling, though interpretative in form, had the effect of changing the exist-

ing regulations. In the course of his opinion, he delivered the following too-oft forgotten advice: "The right to be heard is an important element of due process. In a borderline case, an administrative agency should be quick to grant a hearing. I do not understand why the Deputy Commissioner was so loath to grant one in this case. To do so would have been much less arduous and time-consuming than to engage in this litigation."

Findings.—A failure on the part of the NLRB to make a ruling or finding on each exception of the respondent to the examiner's intermediate report has been held not to violate the requirements of section 8 (b) of the APA. The Board's decision and order, which, save for certain specified particulars, adopted the findings and conclusions of the examiner, unmistakably informed respondent of its rulings on exceptions. Further particularity is not required. *NLRB v. State Center Warehouse & Cold Storage Co.,* 193 F. 2d 156 (9th Cir. 1951).

Availability of review.—Section 10 of the APA, by its express terms, does not apply to "agency action committed by law to agency discretion." In *Sellas v. Kirk,* 101 F. Supp. 237 (D. Nev. 1951), the court held that the action of the Secretary of the Interior approving a special rule for classification of either land and water as base property for a single livestock operation in a particular grazing district, and the application of such rule, resulting in the granting of plaintiff's application for a grazing permit in part only, came within the above language in section 10 of the APA. Hence it was not subject to any judicial review. Such literal interpretation of the introductory part of section 10 seems unwarranted. If review is precluded in every case where discretion is involved, it would mean that a statute like the APA, which was intended to broaden the availability of review, had the opposite effect. Reading section 10 of the APA as a whole leads to the conclusion that the language at the beginning excepting discretionary action is not to be taken literally. If the draftsmen of the APA really intended all review to be barred whenever agency action involves the exercise of any discretion, how can they logically have provided in section 10 (e) (B) (1) that reviewing courts are to set aside agency action found to be an "abuse of discretion"?

Another application of the language at the beginning of section 10 of the APA that it is to apply except so far as statutes preclude judicial review is contained in *Gentila v. Pace,* 193 F. 2d 924 (App. D.C. 1951). It involved action of the Army Discharge Review Board, created for the purpose of reviewing Army discharges. The statute makes the findings of the Board "final subject only to review by the Secretary" of the Army. The court said that Congress intended that the Board's full and "final" review should not be subjected to a further review, or series of reviews in the courts. If that is true, section 10 of the APA, of course, does not apply. But the court went on to say, "At the very least, we think the statute intends that merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court." If this is the meaning of the enabling Act, there is clearly no such pre-

clusion of review as to make section 10 of the APA inapplicable. In the normal case where section 10 applies, the court will not set aside administrative action merely for error of fact.

In *Almour v. Pace,* 193 S. 2d 699 (App. D.C. 1951), the court held that the district court was without jurisdiction in a suit brought by a former Army officer to obtain retirement with pay, where the officer died after the suit was brought. Under the Tucker Act, the Court of Claims has exclusive jurisdiction of suits by officers of the United States "to recover fees, salary, or compensation for official services." Nor can the lack of jurisdiction in the district courts in this regard be cured by resort to the Declaratory Judgments Act or the APA. Section 10 of the APA provides for judicial review by appropriate remedial form in "any courts of competent jurisdiction" and can hardly be argued to extend the jurisdiction of any court to cases not otherwise within its competence.

OTHER FEDERAL CASES

Administrative power. — An interesting opinion by Judge Prettyman discusses the distinction between the function of the CAB in deciding whether or not to grant certificates of public necessity and convenience to engage in air transportation of freight and that exercised by judicial tribunals. The Board can act upon the basis of its own probable estimate of what will best serve the public interest in the future, as well as upon evidence with regard to present or past facts. The latter, it should be noted, is the type of material alone upon which a body exercising judicial functions can act. "The regulatory function", reads the opinion, "is a forward-looking function, as any examination of regulatory measures easily demonstrates. In that respect it differs markedly from a purely judicial or quasi-judicial determination of present or past rights. Much confusion has crept into the subject by failure to observe that distinction. When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability." *American Airlines v. CAB,* 192 F. 2d 417 (App. D.C. 1951).

In *Pennsylvania Water & Power Co. v. FPC,* 193 F. 2d 230 (App. D.C. 1951), the court asserted that the antitrust laws can have only limited application to industries regulated by specific statutes such as the Federal Power Act. Though regulated industries are not *per se* exempt from the antitrust laws, those statutes are superseded by more specific regulatory statutes to the extent of the repugnancy between them. The FPC had ordered a combination of two utilities under terms and conditions which, if arranged by private contract between them, would violate the federal anti-

trust laws. The Commission had such power, said the court, and motions to annul its order were denied. This was true although a similar arrangement entered into by the utilities themselves had previously been declared invalid under the antitrust acts by another federal court. There was a strong dissent by Judge Miller.

Right to be heard.—In *Western Air Lines v. CAB,* 194 F. 2d 211 (9th Cir. 1952), the Board had approved the transfer of a certificate of public convenience and necessity, but only upon conditions providing protection for employees affected by the transfer. Among these conditions was one providing that in the event of a failure to agree among the parties as to the identity of the employees adversely affected and as to the amount of compensation due them, the parties should submit to arbitration on those issues. The court held that, though the Board had the authority to impose labor protection provisions on the approval of a transfer, it could not require enforced arbitration. The air line concerned is confronted with a mandatory order with which it must comply. The end result upon it is the equivalent of a money judgment. In such a case, it is entitled to the procedural safeguards usually accorded a party against whom such an order or judgment is sought. These include a hearing before the agency or its fact-finding officer, the opportunity to introduce evidence, and to make a record adequate for the purposes of review. Enforced arbitration does not afford these safeguards. The court, indeed, goes on to say that it thinks that the procedure prescribed by the APA is obligatory in the unusual circumstances obtaining here.

A decision of the Court of Appeals for the District of Columbia involves an interesting application of the principle laid down in *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945). The CAB, said the court, is bound by that case to furnish a comparative hearing where two license applications are made to it which are economically mutually exclusive. The Board had granted to one applicant without hearing authority to operate a non-stop service between two cities, where the traffic involved could only support one additional airline operator. In so doing, the court held it had denied the right to be heard of a competing applicant. Where two bona fide applications are mutually exclusive, it is ordinarily true that one may not be granted without a hearing to both. *Northwest Airlines v. CAB,* 194 F. 2d 339 (App. D. C. 1952).

A decision of the Court of Appeals for the District of Columbia reaffirms the right to be heard in license renewal cases, where licensees are conducting a going business under the license. The required hearing need not, however, necessarily be afforded at the administrative level. Where there is a full hearing upon judicial review, the requirements of due process are satisfied. It should, however, be emphasized that, in such a case, only full *de novo* review will remedy the lack of a hearing at the administrative stage. In the instant case, the statute provided for a trial *de novo* upon review (and the court, in its opinion, insisted upon the *de novo* aspect) ; hence due process was satisfied though the agency had not held a hearing. *Columbia Auto Loan, Inc. v. Jordan,* 2 Pike & Fischer Ad. L. 2d 46 (App. D.C. 1952).

Complaint.—The relative looseness of pleadings in administrative law is emphasized by the language used in *American Newspaper Pub. Ass'n v. NLRB,* 193 F. 2d 782 (7th Cir. 1951). In that case, the court held that, where an NLRB complaint fails to allege which subsection of the Labor Act has been violated or alleges the wrong subsection, such failure or mistake, if it does not mislead the parties, does not prevent the Board from considering and deciding the charge presented in the complaint. The sole function of an NLRB complaint, said the court, is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, so that he may have due notice and an opportunity to be heard thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite is that there be a plain statement of the things claimed to constitute an unfair labor practice so that respondent may be put upon his defense. In its language here, the court is, in effect, stating the test for validity of an administrative complaint which was urged by Justice Brandeis in his dissent in *FTC v. Gratz,* 253 U.S. 421, 430 (1920). The federal courts have generally adopted the Brandeis view, and the administrative practice today is by and large a far cry from the requirement of the majority in the *Gratz* case, that an administrative complaint must state a cause of action, in the sense required in an action at law.

The fact that a complaint issued by the NLRB against an employer was based on a charge of unfair labor practices made by a union none of whose members were in the employ of such employer has been held to be immaterial to the right of the Board to issue the complaint. The charge, said the court, is not proof. It does not even serve the purpose of a pleading. It merely sets in motion the machinery of an inquiry. The Board cannot be deprived of jurisdiction because of defects in the charge made to it. *NLRB v. General Shoe Corp.,* 192 F. 2d 504 (6th Cir. 1951). See, similarly, *NLRB v. Kobritz,* 193 F. 2d 8 (1st Cir. 1951). It should, however, be noted that this principle does not apply to a case where the complaint is based upon a charge made by a union which has not filed the non-Communist affidavits required by section 9 (h) of the Labor Act, as amended. In such a case, the statute makes it clear that the Board is without jurisdiction to issue a complaint. *NLRB v. Alside, Inc.,* 192 F. 2d 678 (6th Cir. 1951). Compare *Olin Industries v. NLRB,* 192 F. 2d 799 (5th Cir. 1951) (service of charges upon employer by ordinary mail held mere technical defect, though Board rules required registered mail).

Cross-examination.—In *Daily Review Corp. v. NLRB,* 192 F. 2d 269 (2d Cir. 1951), the court held that an NLRB order could not stand where the examiner had erred in refusing to require a union witness to answer certain questions, on cross-examination, concerning the discussions at a meeting with the New York State Mediation Board . This was true even though the examiner and the Board had accepted the testimony of the employer's witnesses about what was said at the meeting. One cannot be certain, said Judge Frank, that the witnesses' testimony might not have been damaging to the Board's case. The decision is but another

illustration of the judicial tendency to hold that, in formal adversary proceedings, the parties have a right of cross-examination analogous to that which they possess in court-room proceedings. See, e.g., *Reilly v. Pinkus,* 338 U.S. 269 (1949). For another decision setting aside an administrative order because of undue restriction of cross-examination, *Shaw v. Duncan,* 194 F. 2d 779 (10th Cir. 1952.)

Evidence.—An NLRB order based upon hearsay was set aside in *Ohio Associated Tel. Co. v. NLRB,* 192 F. 2d 664 (6th Cir. 1951), where the Board had erroneously held that the case came within one of the exceptions to the hearsay rule.

Bias.—A decision in the Fifth Circuit holds that the decision of the Supreme Court in *NLRB v. Pittsburgh S. S. Co.,* 337 U.S. 656 (1949), that the mere fact that the examiner uniformly credits the witnesses of the NLRB and uniformly discredits those of the employer is not, of itself, enough to make out a case of bias, does not mean that the examiner can refuse to accept the uncontradicted testimony of the employer's witnesses. In such a case, though bias cannot be found under the *Pittsburgh S. S.* case, the order will be set aside as without reasonable support in the evidence. That the court actually felt that the examiner was biased, but that it felt its hands were tied on that question by the *Pittsburgh S. S.* case, is shown by its characterization of the examiner's attitude. The opinion states that "to his eager credulity, straws in the wind, offered in support of the Board's case, became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ." *NLRB v. Ray Smith Transport Co.,* 193 F. 2d 142 (5th Cir. 1951). See *NLRB v. North Texas Motor Freight Lines,* 193 F. 2d 394 (5th Cir. 1951), for another case applying the principle of the *Pittsburgh S. S.* case.

Exclusiveness of record.—The doctrine of exclusiveness of the record was held to have been violated in *Alexiou v. McGrath,* 101 F. Supp. 421 (D.C. 1951). That case involved a deportation proceeding, where, ever since the *Japanese Immigrant Case,* 189 U.S. 86 (1903), it has been recognized that the alien is entitled to a full and fair hearing. In the instant case, it was held to be a denial of due process for the agency concerned to base its decision denying the alien's request for suspension of deportation because of secret evidence of a confidential nature. Evidence not of record cannot be considered in such a proceeding. Even though the grant or denial of suspension of deportation is discretionary, since the agency's regulations do provide for a fair hearing, the court's power of inquiry into the procedural question is like that which it has on review of an ordinary deportation order. Compare *United States ex. rel. Kustas v. Williams,* 194 F. 2d 642 (2d Cir. 1952).

Exclusion from agency practice.—A decision in the District of Columbia has held that the NLRB did not have the authority to suspend from practice before it an attorney who assaulted a lawyer representing the General Counsel during an unfair labor practice hearing, in the absence of a Board rule regulating the admission of persons authorized to practice before it. Though recognizing that, under *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926), the

NLRB had the power to prescribe rules for the admission of persons to practice before it, the Board's failure to prescribe such rules was held to eliminate the legislative sanction upon which the challenged order must rest. It is one thing for Congress to say that an administrative agency shall have the right to prescribe by rule for the admission and disciplining of attorneys who practice before it, and quite another to say that Congress intended such agency to adjudicate and enforce disciplinary action without any statutory provision or rule promulgated in pursuance of statutory authority. *Camp v. Herzog,* 20 Law Week 2499 (D.D.C. 1952).

Cupples v. Marzall, 101 F. Supp. 579 (D.C. 1952), involved judicial review of the Commissioner of Patents' denial of admission to practice before the Patent Office. Such review is expressly provided for by statute, but this is the first case where such review has been sought. The court held that its function was not that of a trier of the facts, but merely to review what has been done to determine whether or not a fair hearing has been had and whether there is substantial evidence to support the action of the Patent Office. In a case like this, where denial of admission was based upon the applicant's grade on a written examination, for review to have any real effectiveness, the court must determine whether there was any substantial basis for the Commissioner's grading of the examination. The court, therefore, compared plaintiff's paper with those of successful applicants and the approved answers, to determine whether fair treatment was afforded the plaintiff. Though this method of review places quite a burden upon the court, it feels that nothing else will satisfy the Congressional mandate.

Primary jurisdiction.—An action by a natural gas company against a company engaged in the transportation of natural gas for damages under the Sherman Act for failure to transport plaintiff's gas must be dismissed, where plaintiff had not applied to the FPC for relief. Whether and to what extent plaintiff should be permitted to use defendant's facilities, and what services then being rendered should be abandoned, is strictly an administrative question. The administrative remedy is exclusive, at least until the Commission has passed upon the validity of the practices and classifications involved. *Interstate Nat. Gas Co. v. Southern California Gas Co.,* 102 F. Supp. 685 (S.D. Cal. 1952). Here again, a federal court seems to be carrying the primary jurisdiction doctrine too far. The relief requested (the award of damages) is not within the power of the FPC. Why should the plaintiff have to bring two actions, when the court, which can alone grant the relief he seeks, can dispose of the entire matter at once in the one suit? For another case of this type, see *Furrow & Co. v. American Airlines,* 102 F. Supp. 808 (W.D. Okla. 1952). Compare *Texas State Federation of Labor v. Brown & Root,* 246 S.W. 2d 938 (Tex. 1952), discussed *infra* p. 78.

The FPC brought an action to secure enforcement of an order finding defendant company subject to the Commission's jurisdiction and directing the company to comply with the Commission's regulations. Defendant urged that the Commission had no power to institute the proceeding because it had no authority to determine the ques-

tion of coverage, i.e., to classify the company as a "public utility" under the enabling Act. According to it, a judicial determination of "public utility" status must be made before the Commission can act. This contention was rejected by the Court of Appeals for the Ninth Circuit in *FPC v. Arizona Edison Co.*, 194 F. 2d 679 (9th Cir. 1952). The orderly procedure inherent in the statutory scheme, said the court, contemplates that the Commission in the exercise of its broad regulatory powers may determine coverage of the enabling Act. To hold otherwise would result in piecemeal administration of the Act, burdensome delays in giving effect to congressional intent, and might deprive the courts of the informed judgment of the Commission on so fundamental a question.

The above holding, which involves merely another application of the primary jurisdiction doctrine as it is employed in the federal courts, was not, however, all which the FPC sought to have the court make. The Commission urged that in an enforcement proceeding, the district court may not inquire into the correctness of its determination of coverage under the Act, nor indeed into any question of the validity of its order. This extreme view was not followed by the court. "We do not think", said Judge Orr, "the statute requires a reading that would deprive a court of equity of its traditional power of scrutinizing the order sought to be enforced to determine whether the Commission has 'patently traveled outside the orbit of its authority.' "

In the well-known case of *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948), the court held that suit for an injunction by a union against an employer would not lie to restrain an unfair labor practice. The ground of that decision was that Congress intended that proceedings before the NLRB should be the exclusive remedy for unfair labor practices. A more recent decision in the fourth Circuit seems, however, to impose an important qualification upon the doctrine of the *Amazon Cotton Mill* case. In it, the court held that where substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may also constitute an unfair labor practice within the meaning of the National Labor Relations Act. Thus, in a suit by a union against an employer, though there was no jurisdiction in the court to grant relief with respect to any refusal to bargain, which, if established, would be an unfair labor practice within the exclusive jurisdiction of the Labor Board, the court did have the jurisdiction to grant relief with respect to the alleged breaches of contract relating to refusal to accord to striking employees the status and rights to which they were entitled under the bargaining agreement. *Textile Workers Union v. Arista Mills Co.*, 193 F. 2d 529 (4th Cir. 1951). One may sympathize with the court's desire to maintain the judicial jurisdiction in breach of contract cases. Yet it may be wondered whether the decision is not contrary both to the *Amazon Cotton Mill* case and the constant jurisprudence of the Supreme Court. Ever since *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), that tribunal has firmly adhered to

the proposition that, once jurisdiction is vested in an administrative agency, it has exclusive jurisdiction and the courts are divested of whatever competence they might otherwise possess in the particular case.

Availability of review.—In *Macauley v. Waterman S. S. Corp.*, 327 U.S. 540 (1946), the Court held that the Tax Court had exclusive jurisdiction in renegotiation cases to determine "what are and are not negotiable contracts" within the Renegotiation Act. Hence, the individual concerned could not obtain an injunction to prevent the administration from acting with regard to him, even though he claimed that the contract in question was not within the coverage of the Act and that there was consequently no administrative jurisdiction over him. See *Schwartz, Jurisdiction to Determine Jurisdiction in Federal Administrative Law,* 38 Geo. L. J. 368 (1950). In a case decided by the Court of Appeals for the District of Columbia, it was contended that the *Macauley* case barred the court from reviewing the decision of the Tax Court that petitioner and another company were under common control within the meaning of the Renegotiation Act and that hence their profits should be considered in the aggregate for the purpose of determining whether the $500,000 amount required by the Act was present. The court rejected this contention. The determination was one of jurisdiction, for the finding of common control was requisite to the right to renegotiate profits of petitioner. A determination of jurisdiction of this type is subject to review. *Lowell Wool By-Products Co. v. War Contracts Price Adjustment Board,* 192 F. 2d 405 (App. D.C. 1951). In other words, the *Macauley* case merely requires the exhaustion of administrative remedies even where it is claimed that the agency is acting beyond its jurisdiction. It does not bar consideration by the court of the jurisdictional question at the stage of judicial review.

The Court of Appeals for the District of Columbia has held that it had jurisdiction to review a finding of the Atomic Energy Commission that the owners of certain patents and inventions were not entitled to an award under the Atomic Energy Act for the alleged use of the inventions in the atomic energy field. The court went on to hold that it could not, however, review the Commission's decision concerning "just compensation." One aggrieved by such decision may bring suit against the United States in the Court of Claims or in a district court, but he cannot come to the Court of Appeals for review. *Fletcher v. United States Atomic Energy Commission,* 192 F. 2d 29 (App. D.C. 1951).

The Court of Appeals for the Fourth Circuit has held that review of an NLRB order was not available where the respondent had filed no exceptions to the examiner's report and no extraordinary circumstances were suggested to excuse the neglect to do so. *NLRB v. Pugh & Barr Co.,* 194 F. 2d 217 (4th Cir. 1952). Respondent here failed to observe one of the basic elementary requirements of administrative law, that demanding the private party to present his case, state his contentions, and "preserve" the errors he deems the agency to have made at the agency level, a requirement which is expressly contained in the Labor Act, but which exists even in the absence of legislative articulation.

Parties.—The Commissioner of Immigration and Naturalization is an indispensable party in an action for review of a deportation order, according to *Birns v. Commissioner of Immigration and Nationalization,* 2 Pike & Fischer Ad. L. 2d 67 (N.D. Ohio 1952). One wonders whether this is not an unduly narrow construction of the rule of *Williams v. Fanning,* 332 U.S. 490 (1948). If the court is correct, it is, in effect, taking away from the alien subject to a deportation order much of what he has gained from the recent judicial holdings under which deportation orders may be directly reviewed, with the alien no longer having to wait until he was taken into custody, when he could bring habeas corpus. Since the Commissioner can be sued only in the District of Columbia, the holding that he is an indispensable party may make it most difficult, as a practical matter, for aliens who are not within easy access to the District of Columbia to bring direct review actions.

Questions of law.—A decision in the Fifth Circuit set aside an FTC order on the ground that the practice prohibited by the Commission did not constitute an unfair method of competition. The ultimate determination of what constitutes unfair competition is for the court, said Judge Holmes. not for the Commission. *Motion Picture Advertising Service Co. v. FTC,* 194 F. 2d 633 (5th Cir. 1952) This is, in effect, a reiteration of a famous passage in the majority opinion of what is usually considered to be the now-discredited case of *FTC v. Gratz,* 253 U.S. 421, 427 (1920). It indicates that, though the *Gratz* case may have gone too far in implying that no weight is to be given to the administrative determination, it is just as erroneous to go to the other extreme and treat a finding of this type merely as a finding of fact for the purposes of review. What constitutes unfair competition is basically a question of law and, though some respect must be given to the judgment of the Commission, it is clearly the reviewing court's duty to reverse if it feels that the Commission has decided erroneously on the point.

According to the Court of Appeals for the District of Columbia, whether the term "injury" in the section of the Longshoremen's and Harbor Worker's Compensation Act relating to time for filing of claims includes recurrence of disease is a question of law to be determined by the court. Though it formerly thought otherwise, said the court, it is now convinced that the question involved is one for judicial determination. The test applied is whether the question at issue is primarily generic, or whether it had peculiar specific elements, as was the case, for example, in *O'Leary v. Brown-Pacific-Maxon,* 340 U.S. 504 (1951). Few questions, asserted the court, are more purely generic than the one before it. The question is quite severable from the experience of industry and peculiarly appropriate for independent judicial ascertainment as a question of law. *Cadwallader v. Sholl,* 2 Pike & Fischer Ad. L. 2d 9 (App. D. C. 1952). It is interesting to note that this decision of the court was rendered upon rehearing. In its first decision, the court had held that the scope of its review power over a question like that at issue was like that which existed with regard to questions of fact.

Jurisdictional fact.—N. A. Woodworth Co. v. Kavanagh, 102 F. Supp. 9 (E.D. Mich. 1952), involved an action against a Collector of Internal Revenue to recover an income tax deficiency assessment resulting from the disallowance as deductions of wage payments which the National War Labor Board had determined were made in violation of the Wage Stabilization Act of 1942. Plaintiff claimed that those to whom the payments had been made were independent contractors as a matter of law so that the Board had no authority with respect to payments made to them. It argued that, though the question of whether or not those people were employees of the plaintiff is one of fact, under the doctrine of *Crowell v. Benson,* 285 U.S. 22 (1932), it is a "jurisdictional fact", which by its nature entitled plaintiff to a trial *de novo* on the question. The court held, however, that the determination at issue was not one of jurisdictional fact and under the pattern of Supreme Court decisions since *Crowell v. Benson,* plaintiff was not entitled to a new hearing on the issue.

Tort Claims.—Chournos v. United States, 193 F. 2d 321 (10th Cir. 1951), involved an action under the Federal Tort Claims Act to recover damages resulting from the alleged improper administration of the Taylor Grazing Act on public lands contiguous to lands owned and controlled by plaintiff. Plaintiff alleged that under the grazing law he was, as a matter of law, entitled to grazing permits upon adjacent and contiguous lands; that the representatives of the United States, for the purpose of coercing plaintiff into surrendering his lands, refused to issue such permits; and that such refusal and coercion were unlawful and constituted a tort within the Tort Claims Act. The court held, however, that the granting or rejection of plaintiff's applications for a permit was within the discretionary functions of the range officials, and hence within one of the express exemptions in the Tort Claims Act. This was true even if the administrative action at issue was unlawful.

STATE CASES

Right to be heard.—A decision of the New York Court of Appeals deals with the important question of the right of the holder of an automobile driver's license to be heard prior to the revocation of such license. The court, in strong language, asserted that the holder of such a license had the normal due process right to a full hearing. "A license to operate an automobile," said Judge Froessel, "is of tremendous value to the individual and may not be taken away except by due process. If in the instant case it may be done loosely and informally . . ., then it may be done in every case, and every automobile driver in the State will be at the mercy of the commissioner and his assistants. However much we may recognize the need for the rightful exercise by the commissioner of his duties in his laudable effort to prevent unsafe driving on the highways, it would be a dangerous step indeed if we permitted him to follow any loose practice formulated by him, regardless of the law." *Wignall v. Fletcher,* 103 N.E. 2d 731 (N.Y. 1952).

The decision of the court is of great significance. It has often been asserted, in the past, that the operation of a motor ve-

hicle is a mere privilege. As such, a motor vehicle license could be suspended or revoked summarily. Under modern conditions, however, such a view has become unrealistic. The license to operate an automobile is today of vital importance to most people and should be protected by due process, just as are other valuable property "rights." And, even if it be classified as a privilege which the legislature need not grant at all, that does not mean that it can be taken away from the individual citizen by an administrative officer without notice and hearing.

Concentration of functions.—A decision by the Appellate Division of the New Jersey Superior Court deals with a problem with which students of American administrative law have been much concerned, that of the merger of the powers of prosecutor and judge in administrative agencies. The wisdom and prudence of the legislative delegation of such powers to the administration are not justiciable subjects. It was argued that, in view of the concentration of functions in the agency concerned, the court should, in reviewing, take into account the implications of such concentration in determining the substantiality of evidence in support of the agency's findings. This view was adopted in an interesting concurring opinion by Brennan, J.A.D. The implications of concentration, said he, stand in bold relief when the agency's factual findings rest heavily on its investigators' testimony. A relationship of mutual trust and confidence necessarily obtains between the agency and its appointees; the agency naturally imposes trust and confidence in its investigators or it could not function efficiently. When the court scrutinizes the evidence to assay its quality, it cannot close its mind to the plainly implied obstacle to the agency's complete detachment which inheres in that relationship. *In re Larsen*, 86 A. 2d 430 (N.J. 1952).

Primary jurisdiction.—An interesting Texas case involved an action by an employer against a union for damages and injunctive relief based upon allegations of a conspiracy to destroy the employer's business by the use of unfair lists, picketing, and secondary boycotts, because the employer would not engage in prohibited unfair labor practices. Defendants contended that the employer should have pursued its administrative remedies in the NLRB to exhaustion before resorting to the courts. The court rejected this contention, since the NLRB could not determine plaintiff's claim for damages. Exhaustion of administrative remedies, reads the opinion, is required only when the agency can give adequate relief. *Texas State Federation of Labor v. Brown & Root*, 246 S.W. 2d 938 (Tex. 1952).

The holding of the Texas court appears contrary to that taken in the federal courts. Under the federal application of the primary jurisdiction doctrine, the courts are barred from considering a case over which an administrative agency has competence, even though the agency has no authority to award the relief which plaintiff requests. See *Interstate Nat. Gas Co. v. Southern California Gas Co.*, 102 F. Supp. 685 (S.D. Cal. 1952), discussed *supra* p. 73. The view of the Texas court seems preferable to that of the federal courts. Why should the plaintiff have to bring two actions, when the whole trend of our law,

since the merger of law and equity, has been away from artificial dichotomizations of remedial justice? As the Texas court aptly put it, "It is no answer to say that damages could have been sought in one forum and injunctive relief in another, for this would involve the bringing of separate and independent suits, productive of multiplicity and vexation." *246 S.W. 2d at 941.*

Administrative finality.—A Maryland decision illustrates what ought to be the approach of our courts to statutory provisions for administrative finality. The enabling Act provided that "the findings of fact by the Commission shall be final and not subject to review or modification by the Court." Such provision, said Judge Delaplaine, did not have the effect of placing the administrative fact findings beyond all judicial control. "This provision cannot override the basic principle that the Legislature cannot divest the courts of their inherent power to review the actions of administrative agencies which are illegal, arbitrary, or unreasonable and which impair personal or property rights. There is an implied limitation upon the authority of the State Industrial Accident Commission that its findings shall be supported by legally sufficient evidence, for a finding unsupported by any evidence is beyond the power of an administrative agency as a denial of due process of law." *Johnstown Coal & Coke Co. v. Dishong,* 84 A. 2d 847 (Md. 1951).

Questions of law.—That many of the state courts are not willing to follow the implications of decisions like *Gray v. Powell,* 314 U.S. 402 (1941), and *NLRB v. Hearst Publications,* 322 U.S. 111 (1944), is shown by an Alabama case. In the federal cases cited, the Court held that the administrative application of statutory terms or concepts to particular states of fact was to be treated more like a question of fact than one of law, for the purpose of determining the proper scope of review. In the Alabama case referred to, the court held that it was for it to review the question of whether the agency concerned erred in its application of the law to the facts, stating that the finding of facts is a different concept from the judicial function of applying the law to those facts. *Alabama Public Service Commission v. Higginbotham,* 56 S. 2d 401 (Ala. 1951). In the view of the United States Supreme Court, the interpretation and application of statutes are two different things. Interpretation properly so-called includes only the determination *in vacuo* of the proper meaning of the statutory term. The process of determining whether the facts of the particular case are within or without that meaning is primarily an administrative question. To the Alabama court, on the other hand, application is a vital part of interpretation and, as such, is primarily a judicial question. It must be admitted that, under the federal view, the principle that questions of statutory construction are for the courts upon review loses much of its force. As Justice Frankfurter has aptly pointed out, "Meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication." *Trust of Bingham v. Commissioner,* 325 U.S. 365, 380 (1945).

Constitutional fact.—Another application by a state court of the supposedly discredited doctrine of "constitutional fact" enunciated in *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U.S. 287 (1920), is to be found in an Oklahoma decision. Where the

order complained impinges on asserted constitutional rights, the opinion states, the court is authorized to exercise its own independent judgment as to both the law and the facts. *Carter Oil Co. v. State*, 240 P. 2d 787 (Okla. 1951).

LITERATURE

Books:

Justice and Administrative Law. Robson, W. A., Stevens & Sons, Ltd., London, 3d ed. 1951, Pp. xxxiv, 674. The third edition of the first important English treatise on administrative law. Of particular interest are the author's references to developments under the Labor Government. The book deals with the differences between administrative and judicial power; a detailed analysis of English administrative tribunals (in some ways, the most useful chapter); what is called "the judicial mind"; the famous Report of the Committee on Ministers' Powers; the judicial attitude toward the administrative exercise of judicial powers; and an evaluation of administrative justice. Of particular interest are the author's concrete suggestions for improving the present situation, the most important of which would set up a separate administrative court, modelled upon those which exist in many continental countries.

Traité Elémentaire de Droit Administratif. Waline, M., Recueil Sirey, Paris, 6th ed. 1951, Pp. vi, 641. The most recent edition of a now-classic work on French administrative law. Because of the dearth of materials in English on the subject, this book is probably the best starting point for an American administrative lawyer interested in the system which prevails in France. A reading of it will show that the French administrative lawyer has had to grapple with questions concerning the delegation of legislative power, the availability of review over administrative action, the scope of such review when it is available, and the extent of Executive power in emergency—rubrics all too familiar to us on this side of the Atlantic. Study of a treatise like this can thus be most useful to an American. Of course, this is true only of portions of the volume. Much that is in it is peculiar to the French system, and not of great interest to the outsider. Yet, on many of the basic questions, as has been pointed out, the American student can make a valuable study, from a comparative point of view.

Principles of Australian Administrative Law. Friedmann, W., Melbourne University Press, 1950, Pp. 118. A concise study of the basic features of Australian administrative law. The Australian experience is, in some ways, more relevant to this country than that of other members of the British Commonwealth, for Australia, like the United States, lives under a written Constitution, which is enforced by the courts. The author's approach is comparative, constantly seeking to contrast British and Australian law. His analysis includes a treatment of the differences between British and Australian constitutional law; the separation of powers; the growth of administrative justice; judicial review; and liability of the Crown and public authorities.

Articles:

Administrative and Judicial Remedies under the Defense Production Act and Related De-

fense Regulations. Culp, M.S., 14 Ga.B.J. 288, Feb. 1952. A presentation, primarily with reference to the governing statute, of the remedies afforded under an important law. The discussion is stated to be deliberately narrative rather than technically exhaustive in order that as much information as possible be given in a brief space.

Administrative Law. Schwartz, B., 26 N.Y.U. L. Rev. 773, Dec. 1951. A survey of developments in New York during 1950-51.

Administrative Process and the Quasi-Legislative Function. Porter, K.H., 37 Iowa L. Rev. 21, Fall 1951. How is one to distinguish between truly administrative functions and those which are more properly to be considered quasi-legislative or policy-determining functions? The problem is seen to be that of separating the policy-determining function from that of carrying on the proper business of administration. A discussion based primarily upon the Report of the Iowa Governmental Reorganization Commission.

Declaratory Actions. Goldner, B.B., 2 Catholic U.L. Rev. 1, Jan. 1952. An analysis of an administrative practice, which has become of increasing significance, in view of the power given to agencies under section 5 (d) of the APA to issue declaratory orders. Until the APA, all declaratory opinions or rulings were only advisory or non-binding. The need for binding advance determination of rights and liabilities, particularly in tax cases, is emphasized. The article discusses the role of declaratory rulings in administration, the present status of the declaratory ruling (discussing the practice of selected federal agencies), and gives recommendations for implementation of declaratory rulings. One of the major deficiencies of the present practice is the reluctance of federal agencies to exercise the authority conferred by section 5 (d) of the APA. Few declaratory orders have been issued under that section.

Jurisdictional Problems of the Federal Tort Claims Act. Blanton, F., 13 U. of Pitt. L. Rev. 511, Spring 1952. An analysis and criticism of court decisions under the Tort Claims Act. The author states that Congress in passing the Act apparently intended to make the federal government equally as suable in tort as individuals, but that it is much more difficult to proceed against the government because of the construction placed on the Act by most of the federal courts. To remedy this situation, both a more desirable construction of the present Act and improved wording for several of its sections are suggested.

King Does No Wrong—Liability for Misadministration. Parker, R., 5 Vand. L. Rev. 167, Feb. 1952. The effect of the Federal Tort Claims Act upon the common-law maxim that the king can do no wrong. Though the Act has brought us a step forward, it cannot be regarded as a satisfactory change. It creates the impression that the United States is liable whenever a private person would be under the same circumstances. This, however, is unfortunately wrong, in view of the formidable list of exceptions in the Act, especially subsections (a) and (h). The latter exempts the Government from liability for all intentional torts. The former—which is the most significant—retains the gist of the old nonliability doctrine for injuries involving dis-

cretionary conduct. In other words, when the king really acts as a king, he still commits no wrong.

Marasmus of the ICC : The Commission, the Railroads, and the Public Interest. Huntington, S.P., 61 Yale L. J. 467, April 1952. A criticism of the administrative marasmus of the oldest and most influential of our regulatory commissions. Despite its impressive past, there are many indications that the ICC is now losing its position of leadership. New developments are said to threaten to bring about the end of the agency or to reduce it to a secondary position. The most important factor is the rise of a new agency, the Office of the Undersecretary of Commerce for Transportation, which appears to be assuming federal transportation leadership. It is the purpose of the article to analyze the causes of the decline of the ICC and the probable and desirable future position of this agency. The recent reorganization of the Maritime Commission is said to suggest a pattern for application to the ICC. Though one-sided, the article is valuable for its presentation of some aspects of a vital problem.

Review of the Federal Tort Claims Act. Hilley, E.B., 14 Ga. B.J. 301, Feb. 1952. A discussion of the Act which is largely an analytical presentation of its provisions.

State Administrative Procedure Laws: An Appraisal. Heady, F., 12 Pub. Ad. Rev. 10, Winter 1952. A comparative analysis of the provisions of state counterparts of the Federal APA, dealing with rule-making, adjudication, and judicial review. As is the case with many students of public administration, the author is not over-friendly toward administrative procedure legislation.